Nos. 77-1162, 77-1189 and 77-1370

In the Supreme Court of the United States

OCTOBER TERM, 1977

JONES TRANSFER COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

FORD MOTOR COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-11a)[1] is reported at 569 F. 2d 196. The first opinion of the

[1]"Pet. App." refers to the separately bound joint appendix.

Interstate Commerce Commission (Pet. App. 15a-134a) is reported at 124 M.C.C. 680. The opinion of the Commission on reconsideration (Pet. App. 135a-164a) is reported at 126 M.C.C. 803. The opinion of the Commission granting further reconsideration but denying reopening (Pet. App. 165a-173a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1977. The petition for a writ of certiorari in No. 77-1162 was filed on February 16, 1978; the petition in No. 77-1189 was filed on February 21, 1978; and the petition in No. 77-1370 was filed on March 27, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the rules promulgated by the Interstate Commerce Commission to fix charges for the detention of equipment and to define the point at which detention begins and ends are arbitrary or capricious.

STATEMENT

This case involves the uniform motor carrier detention rules promulgated by the Interstate Commerce Commission.[2] These rules are the culmination of a lengthy rulemaking proceeding, which involved three rounds of public comments and three opinions of the Commission. The rules were devised in response to concerns that existing practices discriminated in favor of large shippers that made extensive use of "holding yards" in which they assembled and detained transportation equipment after

[2]The rules are not yet in effect. The court of appeals stayed the effectiveness of the rules pending judicial review, and the stay was continued when the court withheld issuance of its mandate pending this Court's disposition of the petitions for certiorari.

arrival but before unloading. Some parties complained that the lack of uniformity led to arbitrary charges and unlawful concessions; others contended that some charges levied on "detention"[3] were so small that they amounted to unlawful rebates, effectively requiring small shippers that did not use holding yards to subsidize the large shippers that did (see Pet. App. 17a).

The Commission's new rules establish a uniform, nationwide set of detention charges that shippers must pay when they create delay in loading or unloading of transportation equipment. The rules have two major sections: Section 1 governs detention of vehicles "with power" (usually tractor-trailer combinations), and Section 2 governs detention of vehicles "without power" (usually trailer units by themselves).[4] The sections establish periods of "free time" during which detention charges do not apply and uniform rates for detention thereafter. The Commission selected the uniform rate for detention charges after examining the range of carrier-set charges now in effect; the uniform rate is well within that range (Pet. App. 61a).

Because the rules were instituted in response to concerns about large scale holding operations, the most important provisions concern detention of vehicles "without power," which is the usual way vehicles are

[3]The new rules define "detention" as any delay of vehicles at the point of delivery or pickup, where the delay is not attributable to the carrier (Pet. App. 148a).

[4]Petitioners in Nos. 77-1162 and 77-1370 do not challenge the provisions of Section 1.

detained in a marshalling or holding yard.[5] If the consignor or consignee is not ready to load or unload the trailer within a short time after the vehicle arrives, the consignor or consignee may direct the carrier to "spot" the trailer by putting it at a designated location.[6] The carrier then detaches the tractor and leaves the trailer in the consignee's possession pending loading or unloading. The new rule provides that the consignor or consignee has the obligation of moving the trailer within the holding yard (Pet. App. 166a). The carrier is responsible only for the transportation to the place of "spotting," until it is called to pick up the trailer for a line-haul (or, in case of unloading, the unloaded trailer).

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[5]If the consignor or consignee is ready to load or unload the vehicle, or will be ready within a short time, he would direct the power unit to remain with the trailer. The rules for detention of vehicles with power then would apply.

[6]The full definition of "spotting" is (49 C.F.R. 1307.35(e)(2)(2)(f)):

> * * * the placing of a trailer at a specific site designated by consignor, consignee, or other party designated by them, detaching the trailer, and leaving the trailer in full possession of consignor, consignee, or other designated party unattended by carrier's employee and unaccompanied by power unit. Carrier will not move the trailer until such time as it has received notification, pursuant to section 3, that the trailer is ready for pickup at any site on premises. Consignor, consignee, or other designated party may shift the spotted trailer with its own power units at its own expense and risk for the purpose of loading or unloading.
>
> Empty trailers placed at the premises of consignor without specific request are not spotted until the carrier receives a consignor's request and places a trailer for spotting. Movement of the trailer from the consignor's premises to the specific site for spotting shall be the obligation of the carrier, and free time shall accrue as provided in section 3.

Empty trailers left by a carrier at a holding yard without specific request from the shipper are not considered to be "spotted," because the shipper has not designated the location where the trailer has been left. In such instances, section (2)(2)(f) provides that the carrier must shift the empty trailers to a site designated by the consignor (Pet. App. 142a).

The new rules provide that carriers and shippers must enter into agreements concerning schedules for the arrival of vehicles (Pet. App. 156a, 160a). These schedules will enable shippers to plan their loading and unloading to take best advantage of their facilities, and thus will enable carriers to hold detention charges to a minimum (*id.* at 44a).

Under the new rules, detention charges do not apply when trailers are placed in holding yards without a specific designation of place, usually for the convenience of the carrier. But when the shipper detains a vehicle with power, it receives between two and six hours of free time and must pay $18 per hour thereafter, and when the shipper detains a trailer without power, it receives 24 hours of free time and must pay between $25 and $50 per day thereafter. If a shipper desires a carrier to perform "shuttling" services after spotting, the shipper must pay an additional charge (Pet. App. 139a).

2. The Commission concluded that a uniform national rule was necessary because "[d]etention rules, under the guise of flexibility, can provide a fertile source for preferences and other unlawful practices. Without a uniform rule carriers will continuously be tempted or pressured either to interpret provisions of the rules or develop preferential exceptions to the rules in ways most conducive to the maintenance of good relations with influential shippers, to the expense of small shippers" (Pet. App. 33a-34a). The Commission buttressed its conclusion with a recitation of some of the arbitrary treatments and exceptions that had developed under the existing system (*id.* at 28a-33a). The Commission also

concluded that a uniform rule would be easier to enforce (*id.* at 34a) and would decrease the amount of detention, thus making more equipment available for transportation (*id.* at 34a-35a). Although the decision to create uniform rates and practices necessarily caused many changes of the circumstances of individual shippers and carriers, the Commission concluded that "the benefits of uniformity outweigh any minor instances of charges which are not perfectly tuned to the precise needs of all parties" (*id.* at 137a).

The Commission responded to an argument that the detention charges should be cost-justified by stating that "detention charges must have a penalty element in order to achieve their goal of greater vehicle utilization" (Pet. App. 138a). The Commission answered an argument that carriers have a "traditional" duty to shuttle trailers within a holding yard by pointing out that this practice was not universal, and that differences in carrier shuttling were among the forms of preference and unequal treatment that it sought to eliminate (*id.* at 139a-140a). The Commission pointed out, moreover, that the factors creating delay are usually within the control of the shipper, so that efficient use of trailers will best be achieved if the shipper is required to pay the carrier on account of delay; the shipper then can decide whether it is less expensive to reduce the delay (by building additional transfer facilities or by more careful scheduling, for example) or to tolerate the delay (when new facilities would be more expensive than the detention charges). In either event, the rules place the cost of delay on the parties most able to affect the length of delay and to make business judgments about how much delay is efficient. See Pet. App. 140a-142a.

The Commission responded to the contention that the burden of proving the cause of delay should be on the carrier, rather than on the shipper, by stating that "the

very nature of the problem precludes a solution totally satisfactory to both shipper and carrier" (Pet. App. 145a). The allocation of the burden to the shipper is appropriate, the Commission reasoned, because the scheduling rules that it had adopted would permit the shipper to "be in a position to document" any delays in arrival, any special problems in unloading or loading, and the carriers' general record of timeliness (*ibid.*).

3. The court of appeals affirmed. It concluded that "there is a rational basis for the ICC conclusions" (Pet. App. 6a), that the "Commission's findings and conclusions 'are rationally supported[,]' [a]nd to the extent that evidence was required in the record to support the contested conclusions, we find it sufficient to sustain the exercise of the ICC's rulemaking authority" (*id.* at 11a).

ARGUMENT

1. Petitioners' principal argument is that the court of appeals applied a standard of review that was too deferential to the Commission. Petitioners are wrong. The court of appeals quoted at length from (Pet. App. 9a-10a), and applied, the standards of *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742. Since petitioners do not argue that the standard articulated in *Allegheny-Ludlum* is incorrect, it must follow that the standard applied by the court of appeals was proper.

Petitioners seize on the court of appeals' statement that "[w]ere we able to utilize a more expansive notion of what is 'arbitrary, capricious, and an abuse of discretion', we might have been receptive to some of the arguments presented by the petitioners" (Pet. App. 10a). But the court did not imply that it was employing a standard of review *less* searching than that required by *Allegheny-Ludlum*; to the contrary, the court implied that only by employing a standard of review "more expansive" than

that approved by this Court could it agree with petitioners. As we understand the court of appeals, it would have preferred to substitute its judgment in some regards for the judgment of the Commission, but it properly declined to do so, recognizing that a court is not entitled to substitute its judgment for that of the agency. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, No. 76-419, decided April 3, 1978, slip op. 25.

The argument (Jones Pet. 16, 18; National Industrial Traffic League ("NITL") Pet. 11-15; Ford Pet. 13-15) that the court of appeals did not conduct a meaningful review of the Commission's decision is insubstantial. Although the court did not write an extensive opinion, a court need not do so simply to prove that it has discharged its judicial function. Cf. *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n. 4; *United States* v. *Baynes*, 548 F. 2d 481 (C.A. 3), certiorari denied, 431 U.S. 939. The court stated that it had examined the record, considered the arguments, and concluded that the new rules are "rationally supported" (Pet. App. 11a). For the reasons that we discuss below, the court's conclusion is correct.

2. None of the petitioners argues that uniform detention rules are unnecessary. Indeed, as the Commission remarked (Pet. App. 136a), the "need for uniform nationwide rules * * * seems almost universally accepted by the parties to this proceeding."[7] Petitioners argue, instead, that the rules are defective in several respects. But it was inevitable that the Commission would be unable to please everyone; it could do no better than to arrive at a

[7]Petitioner Ford now asserts (Pet. 5) that the nonuniform practices were satisfactory. It took the contrary position before the Commission, arguing there for uniform detention rules (J.A. 33). ("J.A." refers to the appendix in the court of appeals.)

reasonable accommodation of the many disparate interests. We believe that the record indicates that the Commission has done so.

a. All petitioners contend that the Commission should not have defined "spotting" of trailers in a way that requires the consignor or consignee either to be responsible for the movement of trailers within a holding area or to pay a carrier for providing a "shuttling" service (Jones Pet. 19-24; NITL Pet. 18-20; Ford Pet. 9). The Commission thoroughly discussed the considerations supporting its rule—including the need to create an incentive to avoid wasteful delays during detention—in the course of rejecting this contention (Pet. App. 46a, 71a-74a, 139a-140a, 165a-169a). We rely on the Commission's opinion.

The Commission's rules do not alter traditional concepts of pickup and delivery or eliminate a service that has previously been provided under the line-haul rate structure (Pet. App. 73a, 139a, 140a). The line-haul rates of a motor common carrier always have included only one pickup and one delivery.[8] *Rules and Rates, O.K. Transfer & Storage Co.*, 18 M.C.C. 699, 702; *Montgomery Ward & Co.* v. *Northern Pacific Terminal Co.*, 128 F. Supp. 475,

[8]*Atchison, Topeka & Santa Fe Ry.* v. *Wichita Board of Trade*, 412 U.S. 800, 816-618, on which petitioner Ford relies (Pet. 19), does not assist it. This Court held that the Commission must express a reason for permitting railroads to reduce their services without reducing their rates. Here, by contrast, the new rules do not reduce service. Many shippers already move trailers to their docks at their own expense.

491 (D. Ore.).[9] Carriers have not been required to shuttle trailers within yards. Delivery is accomplished when a trailer is left in the consignee's possession. *General Electric Co.* v. *Acme Fast Freight, Inc.*, 324 F. Supp. 1079, 1083 (D. Md.), affirmed, 440 F. 2d 412 (C.A. 4); *Republic Carloading and Distributing Co.* v. *Missouri Pacific Railroad Co.*, 302 F. 2d 381, 386 (C.A. 8). A trailer is, by definition, delivered when spotted, because "spotting" means leaving a trailer in the full possession of the consignor or consignee at a site designated by him.

The Commission considered the effect of the new spotting rule on the use of holding yards and found that "the prescribed rules need not eliminate bullpen and holding yard operations as petitioners imply" (Pet. App. 168a-169a). The new rules simply mean that only shippers that use shuttle operations need bear the cost of shuttling. Other shippers that do not require repeated trailer movements will achieve a relatively lower cost. Petitioner

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[9]Notwithstanding petitioner Jones's assertion (Pet. 23), *Carrier Switching at Industrial Plants in the East*, 294 I.C.C. 159, 167, does not hold that switching charges are included in motor carriers' line-haul rates. The railroad switching practices adopted in that case do not pertain to motor carriers and are based on completely different transportation conditions. The physical nature of rail operations, including the use of one locomotive to haul numerous cars, make rail switching unavoidable. Motor carrier trailer shifting, on the other hand, is required only if the shipper chooses to have the carrier leave a trailer at a site other than the loading dock, and large shippers can perform their own shifting if they choose to establish holding yards.

Hygrade Food Products Corp. Terminal Allowance, 306 I.C.C. 557, 559, is similarly not in point. The case merely indicates that motor carriers spot trailers *at points within the plant area* without charge under the line-haul rates. Under the new detention rules, the motor carrier will continue to spot trailers at any point in the consignor's or consignee's plant area under the line-haul rate. Only subsequent movement of spotted trailers by the carrier will be charged to the consignor or consignee.

Ford has acknowledged that a shipper's volume of freight must be substantial to warrant the use of holding yards (J.A. 57), and there is no reason why small shippers (who do not use holding yards) should pay the same total shipping charges as larger ones, like Ford, who do. Yet that is what would happen if the line-haul rate also included costs attributable to shuttling within holding yards (Pet. App. 169a).

b. Contrary to petitioner Jones's assertions (Pet. 10-13), the Commission's reports are internally consistent and the final (third) report does not conflict with the new rules. Petitioner Jones quotes (Pet. 10) a passage from the Commission's third report discussing the consignee's responsibility for the subsequent movement of a trailer that has been spotted and contends that this contradicts the rule. But the passage does not purport to recapitulate the entire spotting definition and must be read in conjunction with it. The quoted language, which states in part that "the carriers' line-haul obligation ends when a loaded trailer is dropped in the consignee's holding yard," does not supersede the definition of "spotting" contained in the new rules.

c. Petitioner NITL's arguments notwithstanding (Pet. 15-17), the level of detention charges set by the uniform rules is reasonable. One of the best tests of the reasonableness of a rate is to compare it to rates on like traffic in the same general territory. *Western Paper Makers' Chemical Co.* v. *United States*, 271 U.S. 268, 271; *Emery Common Carrier Rates—Various Commodities*, 326 I.C.C. 415, 420. Here, the Commission adopted detention charges that are well within the range of those currently published by the major rate bureaus

(Pet. App. 60a).[10] Moreover, the Commission has indicated its readiness to revise the level of detention charges if future events demonstrate that it would be in the public interest to do so (Pet. App. 60a-61a, 138a).[11]

d. Based on its experience in administering uniform detention rules in the Middle Atlantic and New England regions, which revealed a tendency by shippers to raise spurious claims that delays were carrier-caused, the Commission reasonably concluded that detention abuses can best be minimized by placing the burden on shippers to show that a given delay is attributable to the carrier and should not trigger detention charges (Pet. App. 62a). Petitioners' challenge to this allocation of burdens is unwarranted. The shippers have the best access to information on causes of delay (especially given the new recordkeeping and scheduling rules) and thus should bear the burden of documenting instances of carrier delay (*id.* at 145a).[12]

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[10]Petitioner NITL inaccurately contends (Pet. 16) that the Commission found that existing detention charges bear no relation to carrier costs. To the contrary, the Commission found that regional detention charges reflect multi-regional costs (Pet. App. 57a). Thus the regional charges are a useful model for the creation of nationwide charges.

[11]Petitioner Jones asserts (Pet. 12) that spotted trailers will be subject to the detention charges for vehicles with power. That is incorrect. The language Jones quotes from the Commission's first report is no longer important, because the spotting definition was revised in the third report (Pet. App. 166a, 167a). It is now clear that spotted trailers are dealt with as vehicles without power.

[12]Section 3 of the new rules provides shippers with the option of including arrival and completion times and non-working periods on carrier detention records (Pet. App. 62a-63a, 145a). This gives shippers a measure of control that does not currently exist and puts them in an excellent position to document instances in which delay is attributable to the carrier.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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